No. 18-266

In The Supreme Court of the United States

THE DUTRA GROUP,

Petitioner,

v.

CHRISTOPHER BATTERTON,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF THE GREATER NEW ORLEANS BARGE FLEETING ASSOCIATION, INC. AND OFFSHORE MARINE SERVICE ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI*[1]

The Greater New Orleans Barge Fleeting Association, Inc. ("GNOBFA") is a non-profit association of companies in the operation of barge fleets and towboats on the Mississippi River from New Orleans, Louisiana to Baton Rouge, Louisiana. The purpose of the Association is to promote professional relationships between members, to disseminate information pertaining to the river and fleeting industry, to support member companies when consistent with the interests of the organization as a whole, and to improve relations with surrounding communities, regulatory governmental bodies, and other professional organizations.

Based in New Orleans, Louisiana, the Offshore Marine Service Association ("OMSA") is the leading association of and spokesman for the offshore marine transportation service industry in the United States. OMSA is a trade organization comprised of nearly 170 members. Its members include 70 companies that own and operate vessels that construct, maintain, repair, and transport supplies and workers to and from the thousands of oil and gas facilities in the Gulf of Mexico. OMSA's members also include shipyards, surveyors, vessel equipment manufacturers and distributors, training providers, financial institutions, attorneys and

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[1] Pursuant to this Court's Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person other than *Amici Curiae* and its counsel made a monetary contribution to its preparation or submission. Both Petitioner and Respondent have filed blanket consents to the filing of *Amici Curiae* briefs in support of either party.

accountants that support the offshore service and supply industry. Although OMSA's members are primarily Gulf-based, the members employ maritime workers from around the United States.

Both GNOBFA and OMSA have a strong interest in the outcome of this Honorable Court's decision. Both associations are based in Louisiana and the operations of their members are largely centered along the coast and inland waterways of the area contained in Louisiana's First Congressional District. As a result, the First Congressional District is home to over 33,000 Jones Act jobs, according to a private study performed by PricewaterhouseCoopers ("PwC"). The domestic maritime industry in Louisiana's First Congressional District generates $8.97 billion in economic impact annually, including $2.07 billion in worker income. This makes the First Congressional District the congressional district with the most maritime jobs, likewise, Louisiana is the top domestic maritime state in the United States with over 70,000 Jones Act jobs, the vast majority of which are provided by members of GNOBFA and OMSA.[2] The total economic impact in Louisiana is over $18.2 billion annually.[3] As representatives of various marine operators, who are subject to the Jones Act and the General Maritime Law doctrine

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[2] Press Release, Transportation Institute, Contribution of the Jones Act Shipping Industry to the U.S. Economy (publication forthcoming) (prepared by PricewaterhouseCoopers in October 2018).

[3] *See supra* note 2.

of unseaworthiness, *Amici* file this brief in support of the Petitioner and against the imposition of punitive damages on vessel owners.

SUMMARY OF THE ARGUMENT

Levying punitive damages against a vessel owner under the General Maritime Law for unseaworthiness will result in irreversible and monumental changes that threaten the continued sustainability of the maritime industry and its actors. By its very nature, an unseaworthy condition arises without the knowledge of the vessel owner. But, an award of punitive damages presumably requires a finding of reckless and wanton behavior, thereby implicating standards of negligence as well. The uncertainty of where a seaman's strict liability cause of action for unseaworthiness ends and his claim for negligence begins militates against awarding such damages.

Moreover, allowing such awards would not further the ultimate goal of punitive damages. Punitive damages are meant to deter and punish wrongful conduct. In many instances, an unseaworthy condition does not arise by any action on the part of the vessel owner, but instead by the actions of third parties. Thus, imposing punitive damages on the vessel owner under such circumstances would not deter and punish the proper party.

Awarding punitive damages will leave a lasting impact on the maritime industry and all maritime

actors. Punitive damages are often uninsurable. If a vessel owner can be subject to punitive damages, he could attempt to shift any risk to other unwilling maritime actors. This shift would result in severe repercussions on the maritime industry including a vast increase in the costs of shipping, transportation, and ultimately domestic and foreign trade.

Lastly, the advent of punitive damages in an unseaworthy action will undoubtedly lead to an increase in litigation. Any seaman injured by an alleged unseaworthy condition will bring a claim for punitive damages and force the vessel owner to defend. The threat of punitive damages will result in vessel owners incurring unnecessary defense costs to guard against unfounded or unsubstantiated claims. Moreover, foreign seaman will be encouraged to engage in transoceanic forum shopping and pursue causes of action in the United States in hope of receiving punitive damages.

ARGUMENT

I. Permitting punitive damages awards against vessel owners for an unseaworthy condition will result in a quagmire of uncertainty and upset a century of precedent.

Throughout its development and evolution, the doctrine of unseaworthiness has become less and less predictable for vessel owners, thereby subjecting them to inconsistency and uncertainty regarding the standard of care owed. By denying the imposition of punitive

damages against a vessel owner, this Honorable Court can bring not only clarity, but also transparency to the maritime industry and its various actors.

A Jones Act seaman has three primary avenues of recovery from his employer: maintenance and cure,[4] unseaworthiness, and Jones Act negligence. The unseaworthiness doctrine imposes on a vessel owner a non-delegable duty to ensure that the vessel, its crew, and its appurtenances remain reasonably fit for their intended purpose.[5] In *Mitchell v. Trawler Racer, Inc.*, this Court expounded upon the duty owed by vessel owners:

> What has been said is not to suggest that the owner is obligated to furnish an accident-free ship. The duty is absolute, but it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use. *The standard is not perfection, but reasonable fitness*; not a ship that will weather every conceivable storm or withstand every imaginable peril of

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[4] Dating back to the 13th century, courts recognized that, "the vessel and her owners are liable, in case a seaman falls sick, or is wounded, in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued." *The Osceola*, 189 U.S. 158, 175 (1903). Maintenance and cure refers to the vessel owner's obligation to provide food, lodging, and medical services to a seaman injured while in the service of the vessel. *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 441 (2001). The remedy entitles the seaman to maintenance and cure until he reaches maximum medical improvement. *Vaughan v. Atkinson*, 369 U.S. 527, 532 (1962).

[5] *See Vargas v. McNamara*, 608 F.2d 15 (1st Cir. 1979).

> the sea, but a vessel reasonably suitable for her intended service.[6]

Therefore, the vessel owner may be liable for an unseaworthy condition regardless of the vessel owner's knowledge of the condition.

In the doctrine's early history, the vessel owner was liable for failure to exercise due diligence, a standard of care akin to the duty of a shoreside employer to exercise ordinary care to provide a reasonably safe place to work.[7] It was not until the 1940s that the doctrine of unseaworthiness evolved into a strict liability claim.[8] Although the claim today imposes strict liability, the duty owed by the vessel owner still implicates a question of "reasonableness,"[9] likely a vestige of this historical development. For that reason, unseaworthiness often overlaps with Jones Act negligence.

A vessel could be unseaworthy for any number of reasons: (1) defective gear; (2) appurtenances in disrepair; (3) an unfit crew; (4) improper manning; or

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[6] *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 549 (1960) (emphasis added).

[7] *Mitchell*, 362 U.S. at 544 (explaining the standard of care owed and citing early jurisprudence regarding such).

[8] *See Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944); *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946).

[9] *Colon v. Trinidad Corp.*, 188 F. Supp. 97, 100 (S.D.N.Y. 1960) ("[A] seaman is not absolutely entitled to a deck that is not slippery. He is absolutely entitled to a deck that is not unreasonably slippery."). *See also Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 543–45 (1960) (detailing the origins and development of the unseaworthiness doctrine).

(5) improper method of loading cargo or manner of stowage.[10] "An unseaworthy condition can be found in almost anything, no matter how trivial, that causes injury."[11] A vessel can also be rendered unseaworthy due to the negligent act of a member of the crew, who creates a condition aboard the vessel. However, a vessel owner will not be held liable for an "isolated, personal negligent act" of an employee or member of the crew.[12] Notably, the vessel owner need not create the unseaworthy condition for liability to be imposed. For example, the negligence of third parties or contractors can create an unseaworthy condition aboard a vessel.

Moreover, unseaworthy appurtenances brought on board without the vessel owner's sanction or knowledge can also render the vessel owner liable for any resultant injuries.[13] Such third-party generated unseaworthiness is easily created in the modern day offshore service industry, in which OMSA's members engage. In this industry, the newest and largest class of vessels regularly carry in excess of 100 mariners and industrial workers. Of this amount, the vessel owner directly employs only 20 to 30, also known as the marine crew. The remaining mariners are usually contractors

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[10] *Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494, 499 (1971).

[11] Note, *The Doctrine of Unseaworthiness in the Lower Federal Courts*, 76 HARV. L. REV. 819, 820 (1963).

[12] *Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494, 500 (1971).

[13] *Deffes v. Federal Barge Lines, Inc.*, 361 F.2d 422, 426 (5th Cir. 1966).

employed by the vessel's owner or the vessel's charter. These individuals are charged with, among other tasks, operating and maintaining the appurtenances of the vessel, such as remote operated vehicles ("ROVs"), cranes, and seismic sensing equipment. In a limited but gradually growing number of cases, appurtenances owned, maintained, and operated by the contractor's employer, such as offshore gangways, are placed on the vessel by the vessel's charter. In this case, an appurtenance could be owned, maintained, and operated by third parties who do not work for the vessel owner. Thus, if the decision of the United States Court of Appeals for the Ninth Circuit stands, in this modern industry, a vessel owner is more likely to face punitive damages for injuries caused by appurtenances placed on the vessel by a third party.

Pursuant to the Jones Act, a seaman may bring a claim for negligence against his Jones Act employer for the employer's failure to exercise ordinary care or for the negligence of a fellow crew member.[14] However, because the Jones Act employer typically owns the vessel, more often than not, a seaman's cause of action for unseaworthiness and his Jones Act negligence claim overlap.[15] In fact, "it will be rare that the circumstances of

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[14] Jones Act, 46 U.S.C. § 30104.

[15] *Norfolk Shipbuilding & Drydock Corp. v. Garris*, 532 U.S. 811, 815 (2001) ("We are able to find no rational basis, however, for distinguishing negligence from unseaworthiness.") *See* GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY § 6-38 at 383 (2d ed. 1975) (explaining that Jones Act negligence and unseaworthiness are "Siamese twins.").

an injury constitute negligence but not unseaworthiness."[16] The two claims are alternative grounds of recovery[17] and the seaman is owed "but one indemnity" and may recover for either employer negligence or unseaworthiness, but not both.[18]

Punitive damages are defined as "damages assessed by way of penalizing the wrongdoer or making an example to others."[19] Based on this principle, courts throughout the United States often award punitive damages in addition to compensatory damages, and "the consensus today is that punitives are aimed not at compensation but principally at retribution and deterring harmful conduct."[20] A claim for punitive damages against a tortfeasor typically requires showing willful, wanton, or reckless indifference for the safety of others.[21] In *Exxon Shipping Co. v. Baker*, for example, a district court imposed punitive damages on an employer who knew that the Captain of its vessel was prone to substance

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[16] *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 418 (1953) (Frankfurter, J., concurring).

[17] *McCallister v. Magnolia Petroleum Co.*, 357 U.S. 221, 225 (1958).

[18] *Pac. S.S. Co. v. Peterson*, 278 U.S. 130, 138 (1928) ("[W]hether or not the seaman's injuries were occasioned by the unseaworthiness of the vessel or by the negligence of the master or members of the crew, or both combined, there is but a single wrongful invasion of his primary right of bodily safety and but a single legal wrong . . . for which he is entitled to but one indemnity by way of compensatory damages.").

[19] *Punitive Damages*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[20] *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 492 (2008).

[21] *Id.* at 493.

abuse and who frequently drank aboard the vessel.[22] Thus, in order to award punitive damages for unseaworthiness, a court or jury would need to find that the vessel owner recklessly or knowingly created an unseaworthy condition or allowed such a condition to exist. However, this heightened standard also implicates the Jones Act employer's duty to exercise reasonable care.[23]

It is well-settled that a seaman may not recover punitive damages under the Jones Act from his employer.[24] The intimate relationship between unseaworthiness and Jones Act negligence renders the two claims analytically impossible to separate.[25] There is no clear line of demarcation that signals where the vessel owner's duty to provide a seaworthy vessel ends and where his duty to exercise reasonable care begins.

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[22] *Id.* at 476–77.

[23] *Colburn v. Bunge Towing, Inc.*, 883 F.2d 372, 374 (5th Cir. 1989) ("While a Jones Act employer's duty to provide a safe place for the seaman to work is a broad one, the employer must have notice and the opportunity to correct an unsafe condition before liability attaches. The standard of care is not 'what the employer subjectively knew, but rather what it objectively knew or should have known.'") (internal citations omitted).

[24] *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990); *Bergen v. F/V St. Patrick*, 816 F.2d 1345, 1347 (9th Cir. 1987), *opinion modified on reh'g*, 866 F.2d 318 (9th Cir. 1989) ("Punitive damages are non-pecuniary damages unavailable under the Jones Act."); *Miller v. Am. President Lines, Ltd.*, 989 F.2d 1450, 1457 (6th Cir. 1993) ("It has been the unanimous judgment of the courts since before the enactment of the Jones Act that punitive damages are not recoverable under the Federal Employers' Liability Act. Punitive damages are not therefore recoverable under the Jones Act.").

[25] *Peterson*, 278 U.S. at 138.

If a vessel owner engages in reckless behavior rendering the vessel unseaworthy, the vessel owner has also violated its Jones Act duty to furnish a safe place to work.[26] In the seaman's subsequent action against his employer, the court cannot practically separate the two claims from one another. Therefore, the court essentially will impose punitive damages for the violation of the same legal wrong and merge the two separate doctrines. This result is unworkable in practice and would cause confusion and uncertainty with lower courts attempting to distinguish between these two inextricably linked causes of action.

Although a situation may arise in which the vessel owner is not also the Jones Act employer, the uniformity principle dictates that punitive damages should not be available in any action.[27] Congress maintains the "paramount power" to determine maritime law,[28] however, in the absence of a controlling statute, the federal judiciary may develop and create General Maritime Law.[29] Therefore, General Maritime Law, as developed by the federal courts, coexists with and supplements statutory maritime law as set and pronounced by Congress. Federal courts consistently stress that "the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country," when it granted jurisdiction over admiralty

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[26] *Gautreaux v. Scurlock Marine*, 107 F.3d 331 (5th Cir. 1997).

[27] *Miles v. Apex Marine Corp.*, 498 U.S. 19, 27 (1990).

[28] *S. Pac. Co. v. Jensen*, 244 U.S. 205, 215 (1917).

[29] *E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 864–65 (1986)

cases to federal courts.[30] This uniformity principle serves as a guide not only to Congress, but also federal courts to maintain a consistent body of rules throughout the country.[31] Uniformity grants predictability and stability for maritime actors engaged in commerce throughout the United States.[32] Hence, permitting punitive damages in one situation, but disallowing in another would promote disharmony and tension in maritime law as well as instability in the maritime industry.

Allowing punitive damages for unseaworthiness is theoretically impossible and would reverse a century of precedent denying punitive damages under the Jones Act. Accordingly, awarding punitive damages for an unseaworthiness claim would cause a quagmire of uncertainty[33] regarding the vessel owner's duty to

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[30] *The Lottawanna*, 88 U.S. 558, 575 (1874). *See Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372 (1918).

[31] *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990).

[32] For example, although OMSA's members primarily engage in commerce in the Gulf of Mexico, its members employ seamen from over thirty (30) states. This widespread industry needs a uniform principle throughout the country for its various industry actors.

[33] The imposition of punitive damages for unseaworthiness is further complicated by the "pockets" of *Sieracki* seamen, or seamen *pro hac vice*, who are not members of a vessel's crew, but who may bring an unseaworthiness action against the vessel owner. *See Radut v. State Street Bank & Trust Co.*, 2005 A.M.C. 413 (S.D.N.Y. 2004); *Green v. Vermilion Corp.*, 144 F.3d 332 (5th Cir. 1998) (holding that a cook/watchman performing duties traditionally performed by a seaman was owed the duty of seaworthiness and the General Maritime Law negligence duty to protect his safety).

provide a reasonably safe place to work versus his duty to provide a reasonably fit vessel.

II. Awarding punitive damages against the vessel owner does not accomplish the stated goal of such damages.

The imposition of punitive damages against the vessel owner will not achieve their indicated purpose. Punitive damages are meant to deter wrongful conduct and punish the actor.[34] In the 1818 case of *The Amiable Nancy*, Justice Story noted that damages aimed at deterrence were proper in certain circumstances and explained, "if this were a suit against the original wrong-doers, it might be proper to go yet farther, and visit upon them in the shape of exemplary damages, the proper punishments which belongs to such lawless misconduct."[35]

For the same reasons pronounced by Justice Story, it would be improper to assess punitive damages against a vessel owner in some unseaworthy cases. Oftentimes, an unseaworthy condition aboard a ship arises due to the negligence of a third party, an employee of the vessel owner, or by no action at all.[36] In

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[34] *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 492 (2008).

[35] 16 U.S. 546, 558 (1818).

[36] *See Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539 (1960) (noting that the accumulation of slime and fish gurry during unloading operations could constitute an unseaworthy condition); *Barlas v. United States*, 279 F. Supp. 2d 201 (S.D.N.Y. 2003) (holding that a plastic packing strap on the deck of a vessel constituted an unseaworthy condition); *Seemann v. Coastal Envtl. Grp., Inc.*, 219

these cases, the vessel owner played no part in the creation of the condition, and, yet would potentially be subject to punitive damages, while the "original wrongdoer" escapes blame and liability. Under these circumstances, public policy disfavors awarding punitive damages against the vessel owner.

For example, a "bellicose" seaman aboard the M/V ARCHON rendered a vessel unseaworthy, because the seaman stabbed a fellow crew member repeatedly, killing him.[37] An unfit crew renders a vessel unseaworthy, but in such a situation an award of punitive damages against the vessel owner would not deter the "extraordinarily violent" behavior of the seaman. It would be more proper to assess punitive damages against the bellicose seaman and not against the vessel owner. *Amici* recognize the contrary argument that punitive damages should be assessed against the vessel owner when the vessel owner knows of the condition, but recklessly disregards the potential problem. However, once again, the vessel owner's knowledge of the unseaworthy condition implicates his Jones Act duty to exercise reasonable care under the circumstances.

F. Supp. 3d 362, 369 (E.D.N.Y. 2016) (noting that the United States Court of Appeal for the Second Circuit has held that the presence of ice on a ship's deck may present an unseaworthy condition).

[37] *Miles v. Apex Marine Corp.*, 498 U.S. 19, 21–22 (1990).

III. The imposition of punitive damages will cause a disruption in maritime commerce.

The fundamental interest of maritime jurisdiction is the "protection of maritime commerce."[38] Maritime actors are more willing to engage in commerce if they have the ability to purchase and enforce risk protection.[39] Punitive damages are generally uninsured risks[40] that can cause a major disruption in maritime commerce with maritime actors shifting such risks amongst each other and ultimately to the consumer.

Congress envisioned that "federal admiralty law should be a system of law coextensive with, and operating uniformly in, the whole country."[41] Various admiralty courts recognize that "the need for predictability in the commercial maritime arena is arguably greater than in other areas of law and commerce."[42] Uniformity and the "companion quality of predictability, a prized value in the extensive underwriting of marine risks,

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[38] *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 25 (2004) (quoting *Exxon Corp. v. Central Gulf Lines, Inc.*, 500 U.S. 603, 608 (1991)).

[39] *Ill. Constructors Corp. v. Morency & Assoc.*, 794 F. Supp. 841, 843 (N.D. Ill. 1992) ("The importance of insurance for maritime operations is evident in view of the devastation to maritime commerce that accidents at sea engender and the protection insurance may afford shipowners.").

[40] *Nw. Nat. Cas. Co. v. McNulty*, 307 F.2d 432, 445 (5th Cir. 1962). *See also Fairfield Ins. Co. v. Stephens Martin Paving, LP*, 246 S.W.3d 653, 688 (Tex. 2008) (generally discussing various states' public policy regarding insuring punitive damages).

[41] *Miles*, 498 U.S. at 27.

[43] *Coats v. Penrod Drilling Corp.*, 61 F.3d 1113, 1137 (5th Cir. 1995).

are best preserved by declining to recognize a new and distinct doctrine without assuring the completeness of its fit."[43] The U.S. Fifth Circuit has explained "[i]t is axiomatic that when the rules of law are clear, parties may contract within or around their boundaries, and the commercial system is facilitated in many ways, including reduced litigation, more favorable insurance coverage, and overall ease of application."[44]

Punitive damages threaten the continued sustainability of the maritime industry and will force vessel owners to increase prices downstream, thereby affecting maritime commerce and even other industries.[45] Moreover, as discussed previously, awarding punitive damages for unseaworthiness does not "fit" within the General Maritime Law and its well-established doctrines. For example, a bareboat charterer, as a demise charterer, is the owner *pro hac vice* of the vessel for the duration of the charter. As such, the bareboat charterer is liable *in personam* for the unseaworthiness of the

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[43] *Lewis v. Timco, Inc.*, 716 F.2d 1425, 1428 (5th Cir. 1983).

[44] *Coats*, 61 F.3d at 1137.

[45] *McBride v. Estis Well Serv., LLC*, 768 F.3d 382 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 2310 (2015) (Clement, J., concurring) ("Given the sizeable percentage of the world's goods that travel on ships, and the fact that the prices of the remainder of the world's goods are indirectly influenced by the prices of the goods that do travel on ships (*e.g.*, oil prices ultimately affect the price of a vast range of items), the decision in this case needs to have only the minutest impact on shipping prices to have a significant aggregate cost for consumers. In light of the potentially sizeable impact, this court should not venture too far and too fast in these largely uncharted waters without a clear signal from Congress.").

vessel,[46] however, the vessel owner remains liable *in rem*. If a seaman pursues punitive damages for an unseaworthy condition, it is unclear which party would be assessed punitive damages. This uncertainty will result in both parties factoring this potential cost into the charter agreement, thereby, dramatically affecting costs in the maritime industry.

The above is but one example of a myriad of situations in which increased risks will lead to increased prices. The economic impact of punitive damages and the attendant repercussions on maritime industry is a serious factor that should not be taken lightly. Nationally, the domestic maritime industry accounts for over 648,000 jobs, $41.6 billion in labor compensation, $154.8 billion in economic output, $72.4 billion in value added, and $16.8 billion in taxes.[47] Moreover, America's domestic fleet is comprised of more than 40,000 vessels – one of the largest fleets in the world. Awarding punitive damages for unseaworthiness will impact not only large corporations operating hundreds of vessels, but also smaller "mom and pop"[48] operations employing one vessel. This Court has jealously guarded maritime commerce throughout its history and must continue to do so.[49]

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[46] *Forrester v. Ocean Marine Indem. Co.*, 11 F.3d 1213, 1215 (5th Cir. 1993).

[47] *See supra* note 2.

[48] By way of example, more than 50% of OMSA's vessel owners own six vessels or less.

[49] *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 25 (2004).

IV. Permitting punitive damages awards will result in increased litigation and transoceanic forum shopping.

Should this Court decide to allow a seaman to recover punitive damages for unseaworthiness, every seaman will bring a claim against a vessel owner for punitive damages irrespective of its legitimacy. Any crewmember who suffers injuries as a result of an unseaworthy vessel will pursue punitive damages from the vessel owner, regardless of whether the vessel owner acted in a wanton or reckless manner. The mere threat of a claim for punitive damages will force vessel owners to defend any and all claims no matter how unsubstantiated or unfounded. This increase in litigation and its attendant costs will also disrupt maritime commerce and increase costs on maritime industry overall.

Moreover, allowing punitive damages could result in transoceanic forum shopping. The majority of foreign countries do not allow awards of punitive damages,[50] except in very limited and specific circumstances.[51] This Court in *Exxon Shipping Co. v. Baker*, noted, "punitive

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[50] In addition, this further evidences the potential economic impact on maritime commerce. Should the Court impose punitive damages, U.S.-flagged vessels will be at a disadvantage competing with foreign-flagged vessels, who would not otherwise be subject to punitive damages under the law of their country, thereby allowing foreign vessels a cost-base advantage. This is particularly true for members of OMSA who compete with these foreign-flagged vessels performing the same work and services.

[51] *See* John Y. Gotanda, *Charting Developments Concerning Punitive Damages: Is the Tide Changing?*, 45 COLUM. J. TRANSNAT'L L. 507 (2007).

damages overall are higher and more frequent in the United States than they are anywhere else."[52] Although transoceanic forum shopping by foreign seamen may be combatted on the grounds of *forum non conveniens*, foreign seamen will still bring suit in the United States in anticipation of recovering punitive damages. The United States Court of Appeals for the Eleventh Circuit has recognized this problem and described one plaintiff as "the archetypal foreign plaintiff bringing her foreign tort claim to American courts to secure relief more generous than she would get under the law of her homeland."[53] Similar to the plaintiff in *Sigalas*, a foreign crewmember with an unseaworthiness claim is encouraged to bring suit in the United States, for even the slightest possibility of recovering such damages.

CONCLUSION

Although punitive damages have been recognized as part of the General Maritime Law, they have no place in the doctrine of unseaworthiness. Awarding punitive damages for an unseaworthy condition would inextricably fuse the cause of action with a seaman's Jones Act negligence claim against his employer. Furthermore, in most cases, punitive damages will not result in deterrence or retribution, because the vessel

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[52] 554 U.S. 471, 484 (2008).

[53] *Sigalas v. Lido Maritime, Inc.*, 776 F.2d 1512, 1520 (11th Cir. 1985).

owner neither created nor played any part in the creation of the unseaworthy condition. Moreover, imposing punitive damages on a vessel owner will result in tremendous repercussions in the maritime industry, leading to a disruption in commerce and increased costs to be borne by the ultimate consumer. Lastly, punitive damages awards encourage litigation and embolden foreign seamen to engage in transoceanic forum shopping.

Respectfully submitted,

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